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Utah Supreme Court

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Recommended Citation

Brief of Appellant, *State v. Cooperative Security Corp.*, No. 7797 (Utah Supreme Court, 1952).
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In the Supreme Court of the State of Utah

STATE OF UTAH by and through
its ROAD COMMISSION, D. H.
WHITTENBURG, Chairman, H. J.
CORLEISSEN and LAYTON
MAXFIELD, Members of the State
Road Commission,

Plaintiff and Appellant,

— vs. —

COOPERATIVE SECURITY COR-
PORATION OF CHURCH OF
JESUS CHRIST OF L.D.S., a non-
profit corporation of the State of
Utah, and WASATCH STAKE OF
CHURCH OF JESUS CHRIST
OF L.D.S., H. CLAY CUMMINGS,
Trustee, and President of Wasatch
Stake, a corporation sole of the
State of Utah,

Defendant and Respondents.

Case No. 7797

BRIEF OF APPELLANT

FILED

APR 23 1935

Clerk, Supreme Court

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Defendant and Respondents.

Case No. 7797

BRIEF OF APPELLANT

STATEMENT OF FACTS

This action was brought to condemn for highway purposes 7.89 acres of pasture land owned by defendants and used by them in the operation of a dairy farm in Wasatch County. The entire tract, prior to the taking for the highway, contained 131.79 acres (Tr. 4, Exhibit A). After the taking, two small portions of pasture land were left to the north of the new right-of-way, one consisting of 3.28 acres and the other, 1.21 acres. The case was tried to the court without a jury. The trial judge determined the value of the property taken to be \$2,564.-25, computed on the average value per acre of \$325.00 (Finding of Fact No. 10). Plaintiffs accept this finding, and no issue is raised on appeal as to the judgment for the value of the land actually taken.

In Finding of Fact No. 11 the trial court determined the severance damages, or the damage to the remainder of land *not* taken, to be \$10,919.57, and entered judgment accordingly. It is as to this portion of the judgment that plaintiffs seek a review.

The 7.89 acres taken by plaintiffs was a portion of a larger tract of pasturage, containing, before the taking, 131.79 acres (Tr. 4). This property was acquired by defendants several years ago, and used in constructing and operating a dairy ranch in connection with the welfare program of the Mormon church. It was not used as a dairy pasturage prior to defendants' purchase (Tr. 22). At the time of acquiring this tract, defendants acquired another tract, to the north and west and across U. S.

Highway No. 40. These two tracts were claimed by defendants to be one unit and they asked for damages to the latter tract with all improvements thereon, although the latter tract was not touched in any way by this condemnation. All the improvements constructed by defendants in connection with the creation and operation of the dairy farm were placed upon the tract lying to the north and west of U. S. Highway 40, and no improvements were constructed on the tract, a part of which plaintiff took by this action.

Defendants, over plaintiff's objection, presented their case on the theory that the plaintiffs, by the taking of 7.89 acres pasture land from the tract of 131.79 acres, damaged the entire dairy farm as a going business; that the entire farm, as an operating unit, had been severely damaged by the taking of less than eight acres of pasture land (Tr. 20ff). Defendants' witnesses testified, with surprising unanimity, that the dairy farm, as an operating unit, had been depreciated twenty per cent, though there was no evidence offered that a price had been offered for the unit, either before or after the taking by plaintiff.

Defendants operated the farm by pasturing cattle on the land owned or leased by them and feeding the cattle in the winter with feed contributed by their members.

It is plaintiffs' position that defendants were entitled to the judgment of \$2,564.25 for the 7.89 acres of pasture land taken. We raise no question that defend-

ants were also entitled to severance damages for the depreciation in value of the two small portions of pasture land left to the north of the land taken and thus cut off from the defendants' main pasture land. We assert that the allowance of \$10,919.57 for severance damages cannot be supported in law or on the evidence, and is on its face error. Additional facts developed at the trial will be indicated, in the course of the argument, in support of our position.

STATEMENT OF POINTS

POINT I.

THE FACTS OF THIS CASE WILL NOT SUPPORT THE DEFENDANTS' THEORY OF SEVERANCE DAMAGES OR THE TRIAL COURT'S AWARD THEREOF, FOR THE REASON THAT THE DAIRY FARM IS NOT A UNIT OPERATION, AND ADDITIONAL PASTURE LAND WAS AVAILABLE TO DEFENDANTS.

ARGUMENT

POINT I.

THE FACTS OF THIS CASE WILL NOT SUPPORT THE DEFENDANTS' THEORY OF SEVERANCE DAMAGES OR THE TRIAL COURT'S AWARD THEREOF, FOR THE REASON THAT THE DAIRY FARM IS NOT A UNIT OPERATION, AND ADDITIONAL PASTURE LAND WAS AVAILABLE TO DEFENDANTS.

The statute here in question is Section 104-34-10, Chapter 58, Laws of Utah 1951, which, so far as material here, provides:

The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

* * * *

(2) If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvements in the manner proposed by the plaintiff.

There is no question in this case but what defendants are entitled to severance damages to the two small parcels of pasture land to the north of the new right-of-way by virtue of their being isolated from the remainder of the pasturage. The allowance of \$10,919.57 as severance damages is so out of proportion to the value of that land, were it deemed completely useless as a result of the condemnation, that one can only conclude this amount was awarded on the theory that the reduction in acreage of pasture land damaged the entire dairy operation, and that it was impossible to replace such land. This theory, the law and the facts will not support. The measure of damages in such a case as this is the diminution in value of the remaining tract, caused by the taking. *State et al v. Ward et al*, 112 Utah 452, 189 P. 2d 113. The defend-

ants' dairy simply was not diminished in value to that extent by the taking of approximately 6% of its pasturage.

As pointed out, defendants' witnesses were practically unanimous in their assertion that the dairy, as a going business, was depreciated through the taking by twenty per cent. They were not unanimous in their basis for arriving at this figure. Their case was probably best stated by their witness, H. Clay Cummings. He testified, over plaintiffs' objection, that he valued the property at \$100,000.00 before and \$80,000.00 after the taking (Tr. 33). He arrived at the value of the farm by taking into consideration the amount expended by defendants in improving it. This, we submit, is not the proper measure, *State v. Ward, supra*. On cross examination he testified that he arrived at the value of \$80,000.00 after the taking by depreciating, by 20%, all the improvements constructed including the house, dairy barns, corrals and even the personal property such as pitchforks etc. used on the farm (Tr. 34-44). And this, though none of the improvements were on the tract, a portion of which was taken!

The testimony of Mr. Broadbent, Professor of Agriculture at the Utah State Agricultural College (Tr. 98 ff) indicates that he arrived at the 20 percent depreciation in the value of the dairy farm by a somewhat different process. He testified that the improvements built on the dairy ranch had a capacity of approximately 100 cows, and that they should have at least 60 as a minimum for economical operation (Tr. 100). His testimony was to

the effect that the taking of the 7.89 acres by the State reduced the pasturage to the point where it would not support the minimum economical number of cows. This testimony was offered on the theory that the land taken was absolutely irreplaceable. Apart from the legal questions involved, the facts simply will not support this theory. As will be shown hereafter, other land was available to the defendants for use as pasturage. Further, pasture land in that vicinity is usable as such for at most six months of the year (Tr. 51, 52, 219). Defendants produce or raise no other feed for their cattle, but rather procure it from their membership as contributions (Tr. 52, 219). *All* feed except for pasturage is procured by defendants from contributions of members of the Stake and none of it is produced on the dairy farm (Tr. 220). Further, at the time of the trial, more than a year after the taking of the property by the plaintiffs, the defendants were running more cattle (Tr. 51) than before, and no testimony was offered showing that efficiency or production had changed by the taking. Mr. Young testified (Tr. 217) that prior to the taking defendants ran from 100 to 105 head of cattle and at the time of the trial, 110 head of cattle (Tr. 218). In fact production increased. For the year ending October 1946, defendants milked an average of 20 cows (Exh. C). For the year ending October 1947, they milked 22 cows (Exh. D) and for the year ending in October after the taking of the land by the state they milked an average of 47 cows (Exh. E).

The only theory, if any there be, upon which the award of \$10,919.57 severance damages can be main-

tained is that the total pasturage available to defendants prior to the taking by the plaintiff of the 7.89 acres is absolutely essential to the operation of the defendants' dairy farm, that this land is irreplaceable, and that the entire dairy operation has been damaged, in addition to the land taken, to that extent. The facts will not support this theory because the record shows that additional land was available. First, at the time of the taking the defendants were renting from the New Park Mining Company an area of approximately 160 acres to the north of the present properties (Tr. 229-30), and were expending time and money improving this property. In addition thereto the record shows that at the time of the taking of this property the State offered to procure from one Don Berg 15.3 acres immediately adjacent to the defendants' pasture land to the south and east, separated from the present pasture tract by only a fence (Tr. 72, 313). The record further shows that this pasturage is as good as the rest of the pasture land of the defendants and could easily be used by it in connection with its dairy operation. The defendants simply were *not* restricted in available pasture acreage by this action.

We believe the law regarding severance damages where a part only of the tract is taken is well stated in 4 Nichols, Eminent Domain, (3rd edition) p. 307-308.

In determining the extent of an owner's remainder area and its relationship to the parcel taken consideration is given to the physical conditions which exist and not to the manner in which the land is utilized by an owner. The parcel taken

and the remainder area must, prior to the taking, have constituted a single physical unit. Where two physically separated tracts of the same owner are operated as a unit by the owner and only one of such tracts is affected by a partial taking, the unity of operation is not in and of itself sufficient to merit consideration of the second tract as part of the remainder area.

This court in the case of Provo River Water Users' Association v. Carleson et al., 103 Utah 93, 133 P. 2d 277 considered a similar problem. There, the plaintiffs had condemned pastureland belonging to the defendant, the taking of which, defendant claimed, had damaged the remainder of his farm. The jury rendered a verdict granting such damages. The court reversed, stating:

All of the cases in this court, which we have been able to find, have predicated both severance damages and damages to lands not taken, on some physical injury to lands not condemned, such as lowering or raising the level of a street or highway so as to impair access, obstruction of light and view, restriction of the remaining area in size or shape so as to render it less valuable for purposes to which it was formerly adapted, or the creation of noise, smoke, or some other condition which would operate to depreciate the market value of the property remaining.

In the cited case it was further pointed out that the facts would not support the plaintiffs' theory of severance damages in any event for the reason that there was no indication in the record that additional land was not available to the defendant. In this case, there is no question but that additional land was available to the defend-

ants. Further, this additional land was offered to the defendants and they refused to buy it (Tr. 77). It is true the defendants' witness testified that they refused to purchase this additional land because the price was too high (\$4,000.00) but even if we were to grant that it was high this is indeed strange behavior on behalf of the defendants when they assert that the taking of the 7.89 acres substantially destroyed the efficiency of their entire operation. Furthermore, in the instant case there is no evidence that access to the remaining property was impaired, no evidence it cannot be used for the same purposes as previously; no evidence of smoke or noise or anything that would depreciate the market value of the remaining property.

We appreciate the rule of law that the defendant in a condemnation case is entitled to the value of the lands taken and the damages to the remainder, if any, in money and that he cannot be compelled to accept substitute land elsewhere. However, as pointed out in the case of *City of St. Louis v. St. Louis, I. M. & S. Ry. Co.*, 272 Mo. 80, 197 S.W. 107 the matter of the availability of additional land is material in the question of damages to the remainder and to a going business conducted upon the remainder. This testimony that the Berg property consisting of 15.3 acres separated from the defendants' pasture by merely a fence, completely destroys the defendants' theory that by the taking of 7.89 acres from the 131.79 acres the defendants' operation has been reduced below the efficient minimum level and thus damaged the dairy farm irreparably.

This theory is further destroyed by the testimony offered on behalf of the defendants that a year and a half after the taking of the 7.89 acres defendants were running more cattle than they were prior to the taking and that the defendants were continuously engaged in improving the additional lands so as to increase the pasture carrying capacity of the farm. Defendants' theory is further destroyed by testimony offered on their behalf that all of the feed for their cattle comes from sources separate and apart from the farm in question. They would have us believe that the dairy farm in Wasatch County is a self-contained unit operated as such self-contained unit when in fact it is not. The record shows that the defendants at the time of trial had approximately 110 head of cattle on the farm (Tr. 218) yet according to the testimony the best portions of the 131.79 acre tract would support only two cows per acre and the poorest a mere fraction of a cow per acre during the six months pasture season. Furthermore, one of the defendants' witnesses testified that the improvements consisting of the feeding and lounging facilities had a capacity of 60 cows and at the time of the trial defendants were feeding and lounging approximately 55 head (Tr. 226-227). This same witness testified that some dairies are operated commercially without any or with very little pasturage (Tr. 225-226).

CONCLUSION

Defendants, over plaintiffs' objection, were permit-

ted to try their case on the theory that the Wasatch County dairy farm was a unit operation, and that the taking of the 7.89 acres by plaintiffs destroyed the efficient operation of the unit. To support this theory, it was necessary for defendants to establish the unity of operation, and that additional pasture land was not available to replace that taken. The trial court, in awarding severance damages of \$10,919.57, adopted this theory.

We respectfully submit that the evidence will support neither premise. The dairy farm was in fact never operated as a unit geared in its capacity to the size and nature of the pasture land available, and the evidence further shows that additional pasturage in ample amounts was, at the time of the taking, available to defendants.

Defendants are unquestionably entitled to severance damages for the two small tracts lying to the east and north of the right-of-way taken. They are not entitled to the sum awarded. We ask this court to remand the case for the purpose of properly assessing such severance damages.

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